Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC. 20554

In the Matter of:	)	
	)	
Communications Assistance for Law Enforcement Act	)	CC Docket No. 97-213
	)	

REPLY OF U S WEST, INC.

U S WEST, Inc.[1] ("U S WEST") submits this reply in support of its comments urging the Commission to reject the deficiency petition filed by the Department of Justice and the Federal Bureau of Investigation ("DOJ/FBI") regarding the Interim Standard developed by industry pursuant to section 107(a) of the Communications Assistance for Law Enforcement Act ("CALEA"). The comments overwhelmingly demonstrate that the "punch list" capabilities demanded by DOJ/FBI are beyond the scope of section 103 of CALEA. DOJ/FBI have failed to show that the Interim Standard is deficient, and there accordingly is no basis for the Commission to propose, much less adopt, a rule that would include any of those capabilities in a revised standard. Moreover, DOJ/FBI are far wide of the mark in asserting that the Commission has final authority to determine what capabilities are required by section 103. As U S WEST showed in its opening comments, while CALEA enables the Commission to revise a safe harbor standard, it does not allow the Commission to require compliance with that standard. Carriers may comply with section 103 outside of a safe harbor standard, and CALEA leaves it to the courts to determine whether such carriers have complied with the statute. Finally, the Commission can and should remand any technical standardization work to the expert standard-

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[1] U S WEST files this reply on behalf of both itself and its two subsidiary carriers, U S WEST Communications, Inc. and MediaOne Telecommunications, Inc.

setting organizations that already have developed technical requirements for CALEA compliance and that continue to work with law enforcement to develop a technical standard for the punch list capabilities.

I. THE COMMENTS DEMONSTRATE THAT THE PUNCH LIST CAPABILITIES ARE BEYOND THE SCOPE OF SECTION 103.

In their comments, carriers, manufacturers, and privacy groups have presented compelling reasons why the Commission should not adopt — and therefore should not propose — a rule that would add any of the punch list capabilities to the safe harbor standard. Of the 19 commenters, all except DOJ/FBI and the New York City Police Department agree that these capabilities are not required by CALEA's text and go far beyond Congress' clearly expressed intent that the statute do no more (and in some instances do less) than ensure the preservation of law enforcement's preexisting ability to conduct electronic surveillance.

In their comments, DOJ/FBI advance three main arguments in support of their deficiency petition. Each of these arguments is fundamentally flawed. As in their deficiency petition, DOJ/FBI continue to gloss over important statutory limitations on the authority of law enforcement agencies to conduct electronic surveillance.

First, in claiming that section 103 encompasses the capability to intercept conference call conversations after an intercept subject has left the call, DOJ/FBI assert that Title III does not "confine the government to communications in which the individual under investigation . . . is taking part."[2/] But that begs the question. Court orders authorizing wiretaps must specify "the nature and location of the communications *facilities* as to which . . . authority to intercept is granted." *See* 18 U.S.C. § 2518(4)(b) (emphasis added). A court order may

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2/ DOJ/FBI Comments at 7.

authorize surveillance of specified facilities even if the intercept subject is not using them, *see United States v. Kahn*, 415 U.S. 143 (1974), but law enforcement is nonetheless limited to intercepting communications *over those facilities*.[3/] Conversations occurring after an intercept subject has left a conference call do *not* use the intercept subject's facilities.[4/] DOJ/FBI therefore are demanding a capability that is beyond Title III, and hence beyond the scope of section 103 of CALEA.[5/]

DOJ/FBI also continue to seek a broad interpretation of "call-identifying information" under CALEA, ignoring the narrow scope that Congress gave that term.[6/] DOJ/FBI assert, for example, that "call-identifying information" encompasses network-generated signals, party hold/join/drop messages, and feature status information.[7/] But Congress understood call-identifying information as only "the numbers dialed or otherwise transmitted for the purpose of

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3/ *See* U S WEST Comments at 12-14.

4/ *See, e.g.*, CDT Comments at 39; EPIC/EFF/ACLU Comments at 23 n.67; TIA Comments at 34-38.

5/ In its comments, AT&T "assumes" without analysis that a court could lawfully fashion a court order to authorize the interception of the conversations that DOJ/FBI's requested capability would provide. *See* AT&T Comments at 4 n.10. As shown above and in U S WEST's opening comments, however, Title III court orders must identify the specific communications facilities as to which interception is authorized. The capability demanded by DOJ/FBI would not be limited to any specific facilities, and thus no court order could be drafted to authorize such interceptions.

6/ *See* H.R. Rep. No. 103-827 (1994), at 22-23, *reprinted in* 1994 U.S.C.C.A.N. 3489, 3502-03 ("The Committee urges against overbroad interpretation of [CALEA's] requirements. . . . The Committee expects industry, law enforcement and the FCC to narrowly interpret the requirements.").

7/ *See* DOJ/FBI Comments at 12-14.

routing calls through the telecommunications carrier's network."[8/] Similarly, DOJ/FBI demand access to post-cut-through digits[9/] even though Congress made clear its intent that such dialed numbers — *i.e.*, digits "generated by the sender that are used to signal customer premises equipment of the recipient" — "are not to be treated as call-identifying information."[10/] And, contrary to the suggestion of DOJ/FBI,[11/] excluding the post-cut-through capability from the safe harbor standard would not preclude law enforcement from obtaining those post-cut-through digits that are relevant to call processing done by an interexchange carrier. Law enforcement could still obtain those digits by means of either a Title III order or a pen register order directed to the interexchange carrier that carries a subject's calling card calls.[12/]

DOJ/FBI also assert that section 103 requires automated delivery of feature status information because law enforcement supposedly is entitled to such information under the Electronic Communications Privacy Act ("ECPA"). According to DOJ/FBI, information about a subscriber's features and services "constitutes 'signaling information used in call processing' for purposes of § 3121(c)" because that information is used to route calls through the network.[13/] But "signaling information" includes only information transmitted among the nodes of a network (feature status information does *not* fall in this category) and not other information merely used by the network. In any event, the ECPA authorizes law enforcement to gather only *certain*

8/ H.R. Rep. No. 103-827, at 21, *reprinted in* 1994 U.S.C.C.A.N. at 3501.

9/ *See* DOJ/FBI Comments at 10-12.

10/ H.R. Rep. No. 103-827, at 21, *reprinted in* 1994 U.S.C.C.A.N. at 3501.

11/ *See* DOJ/FBI Comments at 11 n.2.

12/ *See* TIA Comments at 42-43.

13/ *See* DOJ/FBI Comments at 14 n.3.

signaling information. The ECPA permits law enforcement to use pen registers and trap-and-trace devices, but the statute defines these mechanisms as devices that yield *telephone numbers* and *digits dialed by subscribers*. *See* 18 U.S.C. § 3127(3) (defining pen register as a device that records "impulses which identify the numbers dialed or otherwise transmitted"); *id.* § 3127(4) (defining trap-and-trace device as a device that captures "impulses which identify the originating number of an instrument or device from which a . . . communication was transmitted"). And the ECPA does not grant law enforcement access even to all of these numbers. Section 3121(c) allows law enforcement to use pen registers to record only those numbers used in call processing and not numbers dialed to interact with customer premises equipment.[14/] Feature status information does not identify any telephone numbers or digits dialed by subscribers. It is therefore beyond the scope of the ECPA and CALEA.[15/]

Finally, the comments demonstrate that revising the Interim Standard to include the punch list capabilities would be inconsistent with the public interest factors that the

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14/ *See* 18 U.S.C. § 3121(c).

15/ U S WEST agrees with AT&T that the Interim Standard incorrectly covers Cellular Digital Packet Data ("CDPD") services and that the Commission should exclude from the standard as errata any reference to CDPD services. *See* AT&T Comments at 17-22. Section 103 of CALEA imposes obligations only on "telecommunications carriers." *See* 47 U.S.C. § 1002(a). That category does not cover providers of CDPD services for two reasons. First, a mobile service provider is not a telecommunications carrier unless it provides commercial mobile service as defined in section 332(d) of the Communications Act of 1934. *See id.* § 1001(8)(B)(i). A service qualifies as a commercial mobile service only if it provides "interconnected service" — that is, service "interconnected with the public switched network." *Id.* § 332(d)(1), (2). And the CDPD network interconnects to the Internet, not to the public switched network. *See* AT&T Comments at 18-19. Second, the term "telecommunications carrier" does not include "persons or entities insofar as they are engaged in providing information services." 47 U.S.C. § 1001(8)(C)(i). And CDPD services are information services because they involve the retrieval of stored information and the transformation of end-user input. *See* AT&T Comments at 21. Thus, a provider of CDPD services is not a telecommunications carrier for purposes of CALEA.

Commission must consider under section 107(b) of CALEA. In particular, the punch list capabilities would impose high costs on carriers and ratepayers[16/] and thus would neither implement the "requirements of section 103 by cost-effective methods" nor "minimize the cost of compliance on residential ratepayers." 47 U.S.C. § 1006(b)(1), (3).

II. DOJ/FBI ARE INCORRECT THAT THE COMMISSION HAS FINAL AUTHORITY TO DETERMINE THE CAPABILITIES REQUIRED BY SECTION 103.

DOJ/FBI argue that any revision of the Interim Standard by the Commission will have a binding, mandatory effect on how carriers must comply with section 103.[17/] That is simply wrong. DOJ/FBI acknowledge, as they must, that a carrier may comply with section 103 without following a specific Commission standard.[18/] In the next breath, however, they assert that Commission standards would be "binding" on industry to the extent that they "identify statutorily required capabilities."[19/] Implicit in this position is the notion that a Commission ruling on a deficiency petition will bind courts in subsequent enforcement actions, at least with respect to "statutorily required capabilities."

16/ *See, e.g.*, AirTouch Comments at 4-5; PrimeCo Comments at 5, 10-12; Sprint Spectrum Comments at 6; TIA Comments at 23-24; U S WEST Comments at 26-27; *see also* Nextel Comments at 4-7.

17/ *See* DOJ/FBI Comments at 14-16.

18/ *See id.* at 15 ("[T]he bare fact that a carrier is not in conformity with standards adopted by the Commission in this proceeding would not mean, by itself, that the carrier is necessarily violating Section 103 or otherwise acting unlawfully.")

19/ *See id.* at 16.

DOJ/FBI cite no legal authority for this new proposition, and indeed there is none. As U S WEST demonstrated in its opening comments,[20/] CALEA leaves it up to carriers to decide how to bring their networks into compliance. Section 103 identifies the four general capability requirements that carriers must satisfy, and section 2522 of Title 18 gives the courts — not the Commission — the authority to enforce these requirements. *See* 18 U.S.C. § 2522. Nothing in CALEA obligates courts to enforce the Commission's view of the scope of section 103. Indeed, section 107(a)(2) — the only provision of CALEA that addresses the legal effect of a Commission standard — suggests just the opposite. Under that section, a carrier "shall be found to be in compliance" with section 103 if the carrier complies with either an industry standard *or* a Commission standard. *See* 47 U.S.C. § 1006(a)(2). A Commission standard, in other words, carries no greater legal weight under CALEA than an industry standard. Thus, CALEA does not even hint that the Commission's interpretation of section 103 would have any binding effect in enforcement proceedings where courts must independently determine whether carriers not within a safe harbor have complied with section 103.

III. THE COMMISSION CAN AND SHOULD REMAND ANY TECHNICAL STANDARDIZATION WORK TO SUBCOMMITTEE TR45.2.

The comments show that the technical requirements proposed by DOJ/FBI are poorly designed and should not be adopted even if the Commission were to revise the Interim Standard to include some of the punch list capabilities. CTIA, for example, has provided a rigorous and extensive engineering critique of the DOJ/FBI technical requirements,[21/] and many

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20/ *See* U S WEST Comments at 28-31.

21/ *See* CTIA Comments, Exhibit 1.

other commenters have asked the Commission to remand any necessary further standardization work to Subcommittee TR45.2.[22/]

The Commission should heed this view in order to ensure that any revised standard will be implemented efficiently and promptly. Neither law enforcement, carriers, nor the public will benefit if the Commission adopts technical requirements that are poorly designed. Law enforcement efforts will be harmed because inadequate technical requirements likely will yield poor electronic surveillance performance. Carriers and the public will suffer because inefficient requirements will needlessly raise the cost of CALEA compliance. Indeed, adoption of the DOJ/FBI technical requirements may make it more likely that carriers will seek to comply with section 103 outside the safe harbor standard, which would create further compatibility problems as carriers adopt a variety of CALEA-compliant technologies.[23/]

Nor should a remand to Subcommittee TR45.2 significantly delay CALEA compliance.[24/] Industry is already working in good faith with DOJ/FBI to develop technical standards for the punch list capabilities, and allowing that process to continue will yield quality technical requirements within a reasonable amount of time. DOJ/FBI have never challenged the technical expertise of Subcommittee TR45.2. Thus, once the Commission decides whether to revise the safe harbor contained in the Interim Standard, Subcommittee TR45.2 can be expected to produce any necessary technical requirements without substantial delay. The Commission, if

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22/ *See* U S WEST Comments at 31; CTIA Comments at 18-22; SBC Comments at 16; PrimeCo Comments at 22; PCIA Comments at 6-7; TIA Comments at 29; AirTouch Comments at 27; AT&T Comments at 15-17; Nextel Comments at 13.

23/ *See* TIA Comments at 20 ("Subtle design differences could cause system incompatibility, network unreliability and even failure.")

24/ *See* DOJ/FBI Comments at 26.

necessary, may ensure the prompt development of such requirements by establishing a timetable for Subcommittee TR45.2's progress.

DOJ/FBI concede that the Commission may adopt an *existing* industry standard as a Commission standard, but they challenge the authority of the Commission to defer to industry for the development of new standards.[25/] The Commission should not be distracted by this formalistic quibbling. Section 107(b) of CALEA authorizes the Commission to revise industry standards that it finds deficient, but nothing in the statute requires the Commission to define such standards down to the last technical detail rather than rely on an expert standard-setting organization such as Subcommittee TR45.2. The Commission plainly has the discretion under CALEA to decide the important policy questions regarding the punch list capabilities and then allow industry, subject to further Commission review, to find the best technical means of complying with the Commission's decision. *See also* 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.").

25/ *See id.* at 25.

CONCLUSION

For the foregoing reasons and the reasons set forth in U S WEST's opening comments, the Commission should reject the DOJ/FBI deficiency petition. If, however, the Commission decides to revise the Interim Standard, the Commission should make clear that compliance with the revised standard is voluntary and remand any necessary technical standardization tasks to Subcommittee TR45.2.

Respectfully submitted,

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June 12, 1998

CERTIFICATE OF SERVICE

I, Todd Zubler, hereby certify that, on this June 12, 1998, I have caused a copy of the foregoing "Reply of U S WEST, Inc." to be served by hand or by first class mail, postage prepaid, on each of the parties set forth on the attached service list.

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